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In the Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1946 and 73-6978

JOSEPH G. SCATA AND WILLIAM E. OWEN, Jr.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1-21) is reported at 492 F. 2d 1100.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1974. Petitions for rehearing were denied on May 28, 1974 (Pet. App. B, pp. 22-23). The petition for a writ of certiorari in No. 73-1946 was filed on June 27, 1974. The petition for a writ of certiorari in No. 73-6978 was filed on June 28, 1974 and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence against petitioner Scata was sufficient to sustain his conviction of conspiracy and of substantive violations of the wire and mail fraud statutes on a theory of aiding and abetting.

2. Whether the indictment against petitioner Owen should have been dismissed because persons between the ages of 21 and 25 and persons of Latin American descent were unlawfully excluded from the grand jury.

3. Whether petitioner Owen's cooperation with the government was the fruit of an unconstitutional search and seizure and whether the government reneged on its agreement to recommend probation in return for Owen's cooperation.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy and several counts of wire and mail fraud in violation of 18 U.S.C. 371, 1341, 1343, and 2. Specifically, petitioner Scata was convicted of conspiracy, five counts of mail fraud and one count of wire fraud; petitioner Owen was convicted of conspiracy, four counts of mail fraud and one count of wire fraud. Scata was sentenced to concurrent four-year prison terms on each of the six substantive charges and to a consecutive two-year term of imprisonment on the conspiracy count. Petitioner Owen was sentenced to concurrent four-year prison terms on each of the five substantive counts and to a consecutive one-year term of imprisonment

on the conspiracy count.[1] The court of appeals reversed as to one of petitioner Scata's substantive convictions[2] and affirmed in all other respects (Pet. App. A, p. 21).[3]

1. The evidence at trial showed a scheme by petitioners and others to defraud persons who sold merchandise to a hardware store which petitioner Owen had purchased. It further demonstrated that petitioners made use of the mails and wire communications in the furtherance of their scheme.

On May 26, 1971, Francis Kesting sold his small Miami, Florida, hardware store, Porter Hardware, Inc., to petitioner William Owen for $5,000. Owen, who was accompanied by petitioner Joseph Scata at the time, had answered a newspaper advertisement listing the store for sale. He gave Kesting $1,000 in cash, a check for $500, and three promissory notes in the total amount of $3,500 (Tr. 306–313, 1485).

Upon taking control of Porter Hardware, Owen proceeded to place orders for substantial quantities of merchandise which were to be delivered to the store on credit. Some of this merchandise was ordered under the fictitious name of "Robert Haven." Numerous sellers supplied goods to Porter's in reliance upon its credit reputation and favorable credit rating previously established by Kesting (Tr. 153–159, 171–175, 183–187, 202–207, 321–325, 338–345, 378–379, 382–

[1] Co-defendants Julius Grossman and Frederick Allen were both given suspended sentences, placed on probation, and fined.

[2] The court concluded that reversal of one of the mail fraud counts was required by this Court's recent decision in *United States* v. *Maze*, 414 U.S. 395.

[3] "Pet. App." refers to petitioner Scata's appendix.

388, 484–489, 501–505, 510–515, 534–539, 551–544, 584–587, 592–593, 603–605, 615–623, 630–631, 1016–1021, 1024, 1233). The merchandise delivered to Porter Hardware was not used to replenish or increase the store's stock of goods, which in fact declined from late May 1971 to the date of the store's closing, August 6, 1971 (Tr. 234–236, 313–316, 1231–1232). Rather, goods delivered to Porter Hardware were given away, resold at less than cost, or stored for later distribution at one of several warehouses operated by Porter's in the city of Miami (Tr. 255–257, 1155, 1160, 1163, 1459, 1486). Only a small amount of cash was kept in the store's cash register, and very little business was done with walk-in customers inside the store (Tr. 233, 1355).

At least $35,000 worth of merchandise delivered to Porter Hardware on credit was never paid for (Tr. 156, 164, 182–183, 220–221, 327, 335, 343, 378–379, 388, 487–488, 505–506, 513, 534, 587–590, 630). Petitioner Owen put off creditors by promising that payment would soon be received, by claiming that it was not yet due and, on at least one occasion, by threatening the creditor (Tr. 159–164, 325–326, 486–487, 505–507, 513–514, 587–590, 620–622, 1022–1023, 1237–1239). Orders were placed with suppliers until Porter Hardware's credit with each was exhausted; the bills then were not paid. Employees of Porter Hardware did not receive their full wages; the former owner of the business was not paid in full; and a check written to cover the cost of renting a warehouse for Porter Hardware failed to clear because of insufficient funds in the bank (Tr. 143–144, 227–228, 313, 316–320, 486,

539–540, 554–565, 620, 875, 1024–1025). Petitioner Owen admitted to law enforcement officials in August of 1971 that he had ordered merchandise on credit for Porter Hardware and then resold it to various persons for one-half its wholesale cost (Tr. 1485–1486).

The evidence indicated that petitioner Scata participated with Owen in directing the affairs of Porter Hardware. Scata authorized the purchase on credit of four new automobile tires, which he then gave to one Elizabeth Cindele (Tr. 451–457, 807–808, 1446–1447). He paid personal debts with Porter Hardware's merchandise, arranged for the sale of some of the goods, and accepted substantial quantities of merchandise himself (Tr. 298, 394–401, 737–741). When one Snider, an employee of Porter Hardware was first introduced to him, Scata asked Owen if Snider could be trusted as an employee (Tr. 1163).

Through Porter Hardware, petitioners and their co-defendants received quantities of goods for their personal use or for resale. Petitioner Scata received brushes, garden hoses, tools, cement, minibikes, an automobile battery, wood for himself and a neighbor, a davit for his boat, a unit for cutting the thread on screws, gasoline for his car, carpeting for his house, two coats of paint for his house, and other merchandise (Tr. 263–275, 739–746, 810, 924, 962–969, 1168–1174, 1446). Co-defendant Grossman obtained a large number of garbage cans, 100 Polaroid cameras, and more than a truckload of other merchandise (Tr. 264, 273, 756–772, 1206, 1455–1456, 1469). Co-defendant Allen received rope, plastic garbage cans, minibikes, paint, portable sinks, cutlery, battery cables,

and other items (Tr. 772–781, 1177–1187, 1223, 1452, 1469, 1476–1481). Petitioner Owen also received merchandise (Tr. 1232–1233).

2. On August 6, 1971, on the basis of information supplied by an informant, police officers stopped an automobile driven by Owen and seized a gun found in a paper bag on the front seat of the vehicle. Owen was then arrested and charged as a convicted felon with possession of a gun in violation of 18 U.S.C. App. 1202(a). (Tr. 211–227, 241–247). After being taken to the police station and being booked, petitioner spoke with Postal Inspector Conner who told Owen that he was suspected of mail fraud and that Conner would like to discuss the matter with petitioner at a later time. Four days later, after his release from custody, Owen met Conner at Conner's office, executed a written waiver of his rights and discussed with Conner the possibility of Owen's cooperation. Petitioner Owen then began cooperating with the government and consented to a search of Porter Hardware and access to the store's records.

On August 12, 1971, Owen appeared before a magistrate on the gun charge, at which time the government attorney, Mr. Quinn, advised the court that an indictment was being obtained in a mail fraud case. Mr. Quinn advised Owen's attorney that petitioner had agreed to cooperate in the mail fraud case and that in return for Owen's cooperation and testimony either Owen would not be indicted or, if he were indicted and convicted, the government would recommend probation (Pet. App. A, p. 11). Petitioner indi-

cated his approval of the agreement. The gun charge against petitioner subsequently was dismissed.

Sometime between September 12 and October 9, 1972, Owen's new attorney, Mr. Tifford, spoke with Quinn. Subsequently, Tifford informed the court that Quinn had told him that the government would apprise the court of Owen's cooperation, but would not recommend probation (Tr. 675–676, 695–696). Quinn advised the court that he had informed Tifford that the government would make known to the court Owen's complete cooperation and would seek from the court "whatever consideration that it could possible [sic] give" on Owen's behalf. Quinn simply could not recall, however, whether he specifically mentioned in this respect a recommendation of probation. He recalled only that he had pointed out to Mr. Tifford that probation might be difficult to secure in view of Owen's reputation and background (Tr. 677–679). However, on October 9, 1972, well before the beginning of the trial in this case, the district court was apprised of the government's position that if Owen testified at trial the government would recommend probation (Tr. 675–676, 680). Despite the fact that this offer remained open throughout trial, Owen did not testify for the government.

ARGUMENT

1. Petitioner Scata contends that the evidence against him was insufficient to sustain his conviction because it showed merely his occasional presence at Porter Hardware, rather than any active participation in the conspiracy. He also argues that the jury

must have relied upon the same insufficient evidence to convict him of the substantive counts.

We have been advised that petitioner Scata still has not surrendered himself to the proper authorities following the issuance of the court of appeals' mandate and that he has not been arrested pursuant to the bench warrant which subsequently was issued. Because of his present self-imposed fugitivity, further review of his conviction in this Court is not available. See *Molinaro* v. *New Jersey*, 396 U.S. 365.

In any event, petitioner Scata's contention that the evidence was insufficient to support his conviction was thoroughly considered and rejected by the court of appeals, on whose opinion we rely (Pet. App. A, pp. 5–8). While the court acknowledged that mere presence at the scene of a crime or mere association with those involved is not sufficient to prove participation in a conspiracy, the court found that much more was involved here. The court pointed to petitioner Scata's receipt of a large amount of merchandise for his personal use, his arranging for sales of merchandise and his inquiry into the trustworthiness of one of the employees (Pet. App. A, pp. 6–7). The court concluded (Pet. App. A, p. 7):

> From these incidents, coupled with his frequent presence at the store, the jury might reasonably infer that Scata was more than merely a bystander at Porter Hardware; that, in fact, he was directly involved in the operation if not the management of the enterprise; and that he was aware of and aided in the conspiracy to defraud suppliers by the use of the mails and wire communication.

Petitioner Scata also argues that the jury must have relied on the same evidence to convict him of the substantive counts and that such reliance was improper. However, if there was evidence beyond mere presence for the jury to consider on the conspiracy count, it was permissible for the jury to consider this same evidence as it related to the substantive counts. It is settled that neither a conviction nor an acquittal on a conspiracy charge bars conviction on the substantive counts, even as an aider and abettor. *Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640, 643–644. The fact that some of the evidence to support the substantive convictions was also used to support the conspiracy charge is immaterial. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *United States* v. *McGowan*, 423 F. 2d 413, 415–417 (C.A. 4). As the court of appeals said in this case (Pet. App. A, pp. 7–8):

> The jury could have inferred from the evidence that there was a conspiracy to defraud suppliers of merchandise, and that Scata was a member of the conspiracy. It follows that the jury could find Scata liable as an aider and abettor in the various substantive offenses. The substantive offenses charged in the indictment result from transactions between Porter Hardware and various suppliers. The individual transactions were merely a part of the general plan. If Scata participated to the extent that he conspired with others in a scheme designed to defraud suppliers, then the jury could properly find that he expected and encouraged the individual communications which constitute the substantive offenses. This would be suf-

ficient participation to make Scata an aider and abettor under substantive Counts 2, 4, 5, 7 and 12.

2. Petitioner Owen contends that the indictment should have been dismissed because the grand jury was constituted unlawfully in violation of 28 U.S.C. 1865. He asserts that in a community which is 25 percent Spanish-speaking and is comprised of a large number of young people, the failure of the clerk of the court to replenish the jury list or pool since July 1968 resulted in there being an insufficent number of persons on the grand jury of Latin American descent and between the ages of 21 and 25.

The court of appeals found petitioner's contention identical to claims raised and rejected in a number of cases involving the same plan for jury selection as that involved in the instant case (Pet. App. A, pp. 18–19).[4] In those cases, the court had concluded that the Jury Plan of the Southern District of Florida conformed to the requirements of 28 U.S.C. 1863 and 1864 and that the plan was constitutional. Insofar as the replenishment of the jury list or pool is required by the statutory scheme, the court concluded that it could take judicial notice of the passage of time since the pool had been replenished and could then calculate the effect of a particular lapse of time in temporarily excluding certain qualified jurors from serv-

[4] Those cases are *United States* v. *Perry*, 480 F. 2d 147 (C.A. 5); *United States* v. *Palacio*, 477 F. 2d 560 (C.A. 5); *United States* v. *Gooding*, 473 F. 2d 425 (C.A. 5), certiorari denied, 412 U.S. 928; *United States* v. *Blair*, 470 F. 2d 331 (C.A. 5), certiorari denied, 411 U.S. 908; *United States* v. *Pentado*, 463 F. 2d 355 (C.A. 5), certiorari denied *sub nom. Ochoa* v. *United States*, 409 U.S. 1079.

ice on the grand or petit jury; the constitutional acceptability of a particular interval of time involved in emptying and refilling the jury wheel could then be determined as a matter of law. *United States* v. *Gooding*, 473 F. 2d 425, 429–430 (C.A. 5); *United States* v. *Perry*, 480 F. 2d 147 (C.A. 5).

As this Court recently said in response to an analogous claim in *Hamling* v. *United States*, No. 73–507, decided June 24, 1974, slip op. p. 48:

> [S]ome play in the joints of the jury selection process is necessary in order to accommodate the practical problems of judicial administration. Congress could reasonably adopt procedures which, while designed to assure that "an impartial jury is drawn from a cross-section of the community," at the same time take into account practical problems in judicial administration. Unless we were to require the daily refilling of the jury wheel, Congress may necessarily conclude that some periodic delay in updating the wheel is reasonable to permit the orderly administration of justice. Invariably of course, as time goes on, the jury wheel will be more and more out of date, especially near the end of the statutorily prescribed time period for updating the wheel. But if the jury wheel is not discriminatory when completely updated at the time of each refilling, a prohibited "purposeful discrimination" does not arise near the end of the period simply because the young and other persons have belatedly become eligible for jury service by becoming registered voters. Since petitioners failed to establish a discriminatory exclusion of the young from their jury, the District Court properly exercised its discre-

> tion in refusing to grant petitioners' motion for a continuance. [Citations and footnotes omitted.]

In the absence of any showing that the conclusions reached in the earlier cases about the jury selection plan of the Southern District of Florida were erroneous, and there having been no attempt to establish in this case the degree of underrepresentation of any particular class, the court of appeals properly relied upon its prior decisions to affirm the conclusion of the district court that no hearing was required and that the time lag asserted was within the permissible limits of the statute and the due process requirements of the Constitution.

3. Petitioner Owen contends that the warrantless search of his automobile and the seizure of the gun were in violation of his Fourth Amendment rights and that this unlawful search, which led to his arrest on the gun charge, was used to coerce his cooperation. Moreover, he asserts that the government reneged on its agreement to recommend probation in return for his full cooperation.

Relying upon this Court's opinion in *Wong Sun* v. *United States*, 371 U.S. 471, the court of appeals properly concluded that "even assuming that the arrest [of Owen] was unlawful, any taint arising from the arrest had dissipated by the time Owen agreed to cooperate with the authorities in the mail fraud case" (Pet. App. A, p. 12). The court pointed out that no deal was offered Owen while he was in custody on the gun charge, that no one interrogated him at that time, that Owen voluntarily returned four days later to

discuss with Conner his cooperation in the case, that he executed a written waiver of his rights, and that there were no oppressive or custodial circumstances at the time that Owen and Conner discussed an agreement (Pet. App. A, p. 14).

The court found equally without merit petitioner Owen's final contention that the government reneged on its part of the agreement with Owen. While counsel for the government could not recall whether at the time of the original negotiations he had promised to recommend probation in exchange for Owen's cooperation, he subsequently apprised the district court and defense counsel that if Owen did testify at trial, the government would recommend probation (Tr. 675–676, 680). Despite the fact that this offer remained open throughout the trial, Owen declined to testify. Accordingly, the court of appeals correctly pointed to the fact that at trial petitioner and not the government backed out of the agreement (Pet. App. A, p. 15).[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

[5] Petitioner Owen's contention that part of the agreement involved a government promise not to indict him for any similar crimes is nowhere supported in the record and is not properly before this Court since it was not raised in the court below. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147.

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